ROYAL BRUNEI AIRLINES SDN. BHD.

v.

PHILIP TAN KOK MING

HIGH COURT, BRUNEI
DATO' SIR DENYS ROBERTS CJ
[CIVIL SUIT NO. 2 OF 1993]
15 APRIL 1993

ARBITRATION: Agreement between plaintiff and principal debtor - Defendant not party to agreement - Agreement containing arbitration clause - Defendant sued as guarantor - Defendant applying to stay proceedings pending reference to arbitration - Trial Court staying proceedings - Appeal against order for stay -Whether defendant entitled to obtain stay.

The plaintif appointed Borneo Leisure Sdn. Bhd. (BL) as its general sales agent for the sale of passenger and cargo transport. It was a term of the agreement that BL should account for the moneys collected on behalf of the plaintiff and pay them over. The defendant in consequence of the plaintiffs' forbearance from suing for the outstanding sum due and owing from BL promised to pay all the outstanding debts due by BL to the plaintiff.

The plaintiff claimed against the defendant for the amount outstanding and the defendant sought to rely upon the arbitration clause in the agreement between the plaintiff and BL. The defendant was not a party to the agreement. The trial Magistrate stayed the proceedings pending reference to arbitration and the plaintiff appealed.

Held:

[1] The rule is that general words in a guarantee of the due performance of all the obligations of the principal debtor will not have the effect of binding a surety if there is an arbitration award. This is so even if the award arises from an arbitration clause containing those obligations of the principal debtor which have been guaranteed by a surety.

[2] An admission by a principle debtor does not bind a surety and is no evidence against him. Nor is the surety bound by any award made against the principal debtor under an arbitration agreement agreement to which the surety was not a party.

[3] It was not open to the Court to stay proceedings in either event since the surety could not properly be said to be acting "through or under" the principal debtor as required by s.4 of the Arbitration Act 1950.

[4] The effect of a stay would be to make the defendant subject to an arbitration agreement to which he was not a party. The correct course is for civil proceedings to be brought in Court to determine the extent of BL's liability and whether or not he he has given a guarantee which makes him liable for that amount.

[Appeal allowed. Costs to the defendant].

Cases referred to:
Swee Pte. Ltd. v. Lim Kian Chai & Anor. [1965-1986] 1 BLR 235 ***(refd)***
Pitchers Ltd. v. Plaza (Queensbury) Ltd. [1940] 1 All ER 151 at p. 155 ***(refd)***
Re Kitchin [1881] 17 Ch.D. 668 ***(refd)***
Brums & Ors. v. Colocatronis (The 'Vasso') [1979] 2 Lloyd's Rep. 412 ***(refd)***
Rumput (Panama) SA and Belzetta Shipping Co. S.A. v. Islamic Republic of Iran Shipping Lines (The 'Leage') [1984] 2 Lloyds Rep. 259 ***(refd)***

Legislation referred to:
Arbitration Act 1950, s. 4
Rules of the High Court, O. 18 r. 18(1)(a)

For the appellant - Raymond Lam; M/s. Joseph Hoo Morris & Lal
For the respondent - Rudy Lee; M/s. Abrahams Davidson & Co.

JUDGMENT

Denys Roberts CJ:
This is an appeal by the plaintiff in this action against the decision of the Registrar given on 15 March 1993, in so far as the decision related to a stay of proceedings in this action, in order that it might be referred to arbitration.

The defendant, at the hearing, sought an extension of time to appeal against the decision of the Registrar of 15 March that there was, on the pleadings and affidavits before her, a reasonable cause of action by the plaintiff.

The defendant's Counsel attributed the delay to the difficulty of obtaining proper instructions from the defendant, though it had been possible to speak to him during the past month when he was within the State.

It is a month since the Registrar's decision. I did not consider that there should be an extension of over a month granted to the defendant to allow him to file a notice of appeal.

Accordingly, I refused such an extension.

Statement of claim

By its statement of claim, dated 11 January 1993, the plaintiff Royal Brunei Airlines Sdn. Bhd. ("RBA") made a claim against the defendant Philip Tan Kok Ming ("Tan") for moneys due to RBA under an agreement of 1 April 1986 between RBA and Borneo Leisure Sdn. Bhd. ("BL").

Under this agreement, BL was appointed as general sales agent for RBA for the sale of passenger and cargo transport.

It was a term of the agreement that BL should account for the monies collected on behalf of RBA and pay them over.

By 1 August 1992, the debt outstanding from BL to RBA was BD742,866.16, plus overdue charges of 1.5% per month. This was the amount of the claim.

Tan, in consequence of RBA's forbearance from suing for the outstanding sum and its continuing to appoint BL as its general sales agent, promised to pay "all outstanding debts due by Borneo Leisure Sdn. Bhd. to the plaintiff".

A conditional appearance was entered by Tan on 26 January 1993.

On 4 March 1993, Tan sought an order that -

(a) the writ and statement of claim of the plaintiff be struck out under O. 18 r. 18 (1) (a);
(b) the proceedings be stayed for the purposes of arbitration.

The Registrar found (a) in favour of the plaintiff, noting that it was for the trial Judge to decide whether there was a guarantee by Tan of the debts of BL.

She stayed the proceedings in this claim and ordered that it be referred to an arbitrator under Clause 21 of the agreement of 1 April 1986.

RBA appeals against the stay of proceedings.

Arbitration

On 1 April 1986, RBA entered an agreement with BL, whereby the latter was appointed as general sales agent for RBA at various places in Sabah and Sarawak, set out in the agreement.

Clause 21 of this agreement was in these terms -

> Any dispute under or arising out of this Agreement shall be referred to a single arbitrator agreed upon by both parties or failing which to arbitration in accordance with the provision of the Laws of Malaysia.

On 11 June 1991, Tan addressed a letter to RBA in which he stated -

> Once again I wish to assure you that I will personally ensure that all outstanding debt owed by Borneo Leisure Sdn. Bhd. will be settled.
>
> As to the five points of law in respect of the deed of guarantee and indemnity, I shall revert to you once I consult my legal adviser by 17 June 1991.

A deed of guarantee had been prepared by RBA's solicitor and was handed to Tan about 9 June. It was never executed or returned by Tan.

The Arbitration Act 1950 ("the Act"), is in force in Brunei. This was decided in *Swee Private Ltd. v. Lim Kian Chai & Anor.* [1965-1986) 1 BLR 235. Section 4 of that Act states -

> 4. If any party to a submission, or any person claiming through or under him, commences any legal proceedings in any Court against any other party to the submission, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to such legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to that Court to stay the proceedings and that Court or a judge thereof if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings.

It is well established by the authorities that the section is permissive only, though this discretion must be exercised judicially and according to well known and ordinary principles -see *Pitchers Ltd. v. Plaza (Queensbury) Ltd.* [1940] 1 All ER 151 at p. 155.

It does not appear to be disputed that the defendant is willing to do whatever is necessary to the proper conduct of the arbitration and has been since the proceedings began, though this does not appear in the defendant's affidavit. It is not, in any event, a matter of much importance.

Clause 21 of the agreement states that "any dispute under or arising out of this Agreement" shall be referred to arbitration. This must refer, subject to s. 4 of the Act, to any dispute arising between parties to the Agreement.

I have no doubt that there is such dispute. The exact amount owing by BL to RBA, its liability to pay interest to RBA and, if so, how much, and the amount of overriding commission due to BL are all in issue. There is therefore a dispute between the parties to the agreement.

Tan, although no doubt in control of BL, was not a signatory to the agreement himself. The arbitration would be between RBA and BL not between RBA and Tan.

Section 4 of the Act, however, is in wider terms and permits a Court to order a stay of proceedings where a defendant is "claiming through or under" a party to a submission to arbitration.

The rule is that general words in a guarantee of the due performance of all the obligations of the principal debtor, will not have the effect of binding a surety if there is an arbitration award. This is so even if the award arises from an arbitration clause containing those obligations of the principal debtor which have been guaranteed by a surety. Thus a guarantee in general terms could not import any obligation to honour an arbitration award - see *Re Kitchin* [1881] 17 Ch.D. 668 and *Brums & Ors. v. Colocatronis (The 'Vasso')* [1979] 2 Lloyd's Rep. 412.

Similarly, in *Rumput (Panama) SA and Belzetta Shipping Co. S.A. v. Islamic Republic of Iran Shipping Lines (The 'Leage')* [1984] 2 Lloyds Rep. 259, it was held that the assignee

of a debt could not be said to be claiming "through or under" the assignor.

This means that an admission by a principal debtor does not bind a surety and is no evidence against him. Nor is the surety bound by any award made against the principal debtor under an arbitration agreement to which the surety was not a party.

It seems to me to follow, from the fact that neither an assignee of a debt nor a surety is bound by an arbitration award, that it would not be open to the Court to stay proceedings before it in either event, since neither the assignee nor the surety could properly be said to be acting "through or under" the assignor or the principal debtor.

In this instance, Tan is said to have guaranteed the debt owed by BL, though this had been strongly challenged by Tan in his affidavit.

I do not consider that it is reasonable to stay these proceedings. The effect of such a stay would be to make Tan subject to an arbitration agreement to which he was not a party.

The correct course is for civil proceedings to be brought against him in the Court, to determine the extent of BL's liability and whether or not he has given a guarantee which makes him liable for that amount.

I must therefore exercise my discretion in favour of refusing the stay of proceedings sought. The appeal is therefore allowed.

The costs here and below should be paid by the plaintiff, such costs to be taxed if not agreed within 30 days.

Having allowed the plaintiff's appeal I directed that -

(a) the defence be delivered on or before 15 May 1993;
(b) the reply, if any, be delivered on or before 31 May 1993;
(c) a summons for directions be issued on or before 15 June 1993;
(d) trial of the action be fixed for 29 July and 31 July 1993.